SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

CHARTER COMMUNICATIONS PROPERTIES, LLC, Plaintiffs, v. COUNTY OF SAN LUIS OBISPO, Defendants.	Case No.: CV 070525 RULING AND ORDER DENYING IN PART, AND GRANTING IN PART, PETITION FOR PEREMPTORY WRIT OF MANDATE

INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff Charter Communications Properties, LLC (Charter) operates the cable television franchises in San Luis Obispo County. As part of its operations Charter is required to run its cables across and through various public rights-of-way, much like other utilities. Each of the local cities (Atascadero, Arroyo Grande, Morro Bay, Paso Robles, etc.) and the County of San Luis Obispo enter into "franchise agreements" with Charter to allow Charter the use of public rights-of-way and to be the sole provider of cable television services. Pursuant to the franchise agreements, Charter pays to each local entity a "franchise fee" of 5%, which is the federally mandated maximum.

Charter's franchise agreements with the local entities are considered "possessory" interests in real property. Consequently, the franchise agreements are "an assessable franchise" subject to property tax. (*Cox Cable San Diego, Inc. v. County of*

San Diego (1986) 185 Cal.App.3d 368) Unlike fee ownership of real property, possessory interests are different because the possessor does not "own" the property "forever;" rather, the right to use the property is for a limited duration.

The San Luis Obispo County Assessor's office (Assessor) is responsible for determining the "values" of property for purposes of taxation. A taxpayer has the right to contest the Assessor's valuation to the San Luis Obispo County Assessment Appeals Board (Board) which is comprised of three members appointed from the community.

Pursuant to the requirements of Proposition 13, and upon Charter's purchase of Sonic Cable and Falcon Cable, the Assessor determined the "base year value" for each franchise agreement. The Assessor then used statutory annual adjustments to the base year valuations to determine the "value to be enrolled" for property tax purposes.

Charter believes the values of the franchise agreements have now decreased below the Assessor's enrolled valuations. Therefore, pursuant to Proposition 8 (Revenue and Tax Code §1603), Charter submitted an application with the Assessor requesting a reduction in the current "valuations" of the franchise agreements. The Assessor then computed the current market values of the franchise agreements and determined those current values were greater than the enrolled values. The Assessor recommended to the Board that the values of the franchise agreements remain at their enrolled values.

In September 2002 and 2003 Charter filed applications nos. 2002-60 and 2003-60, respectively. In each of those applications Charter sought a reduction in the values of the same franchise agreements for the years 2002 and 2003. Additionally, Charter sought a claim for refund. (Revenue and Tax Code §5097) Both applications were set for hearing before the Board on April 16, 2004.

On April 16, 2004, at an evidentiary hearing, it became apparent to the Board that there were several unanswered legal questions relative to tax rules that the Board wished to consider before making any final determinations. Thus, the Board continued

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the hearing and also sought an advisory opinion from the State Board of Equalization regarding the disputed legal issues. (AR Vol. 1 pages 398-405)

On July 20, 2004, County Counsel's office prepared correspondence to the State Board of Equalization requesting clarification on certain tax laws and their application to the "valuing" of Charter's possessory interests. (AR Vol. 2 pages 435-442) On July 13, 2005, the State Board of Equalization responded to the County's correspondence. (AR Vol.2 pages 599-604)

On April 21, 2006, at the continued evidentiary hearing, the Board consolidated Charter's two prior applications from 2002 and 2003 with four new applications submitted by Charter for the years 2001, 2004, 2005 and 2006. Ultimately, the Board determined the Assessor's method of valuation was correct and upheld the Assessor's enrolled values of the franchise agreements. (See AR Vol. 3 pages 895-1075)

The Board's findings and determinations are summarized in its Findings of Fact (See Exhibit 1 attached to Charter's complaint or, alternatively, at AR Vol. 3 pages 1142-1161) Attached to the Findings of Fact as Exhibit A is a chart summarizing the Assessor's enrolled value for each disputed year for each franchise agreement. The chart includes the Assessor's "market value" determination and Charter's claimed "market value." Also attached, as Exhibit B, is a chart containing the Assessor's calculated "market value" of the franchise agreements compared to their adjusted base year values and then resulting "values to be enrolled."

Charter brings suit against the County for refund pursuant to Revenue and Tax Code §5141(c), contending that the Board should have accepted Charter's applications for reduction in valuation and refunds for the alleged overpayments. Charter's prayer includes a claim for $594,918 in refunds for the tax years 2000 through 2005. Charter also seeks a remand for calculation of the refund, as well as a statement of decision.[1]

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1 Although the Court indicated it would accede to this request, a formal Statement of Decision, as defined in CRC §3.1590 is not required because the hearing lasted less than one day. In any event, this Ruling serves as the functional equivalent of the Statement of Decision.

STANDARD OF REVIEW

The parties agree that questions of law determined by the Board are reviewed *de novo* by the Court; whereas factual determinations flowing from the administrative hearing are reviewed under the substantial evidence standard. (*Shell Western E&P, Inc. v. County of Lake* (1990) 224 Cal.App.3d 974, 979-980) Charter contends this case involves three "legal" issues that require the Court's *de novo* review. The County argues that the issues are "factual" determinations and must therefore be reviewed under the substantial evidence standard of review. The applicable standard of review will be addressed further under each disputed issue.

DISCUSSION

Charter and the County agree that the appropriate method for calculating the present "market value" of the franchise agreements is the "capitalization of income approach." The income capitalization approach is the preferred method for valuing cable television possessory interests. [Revenue and Tax Code §107.7(b)(1)] In the Board's Findings of Fact at page 5 there is an example setting forth the five factors (growth rate, expense ratio, economic rent, term of possession and capitalization rate) and how they are used to come up with the market value. The income to be capitalized is the projected economic income to be received by the public agency in exchange for the possessory interest.

The dispute before the Court boils down to two of these five factors: 1) the term of possession; and, 2) economic rent. Otherwise, the parties agree to use a 6% growth rate, a 2% expense rate, and a 12% capitalization rate.

Term of Possession

The "term of possession" is the number of years that constitutes the present market value of the franchise agreement. Under the income capitalization method, the present market value is calculated by determining the present value of each remaining year in the term, and then adding all of those values together. The greater number of years in a term of possession, the greater the present value; fewer years results in a

lower present value. Not surprisingly, the County wants a greater term of possession, whereas Charter desires a lower term of possession.

The franchise agreements originally had 15 year terms whereas now, at renewal, they have 10 year terms. Certain franchise agreements have actually expired and are in the process of being renewed, making two categories of franchise agreements that the Assessor is valuing: (1) franchise agreements that have not yet expired and have years remaining in their terms; and (2) franchise agreements that have expired and are being renewed.

Property Tax Rule 21(d) defines and explains "term of possession" for purposes of the income capitalization approach. Rule 21(d)(1) applies to unexpired franchise agreements and (d)(2) applies to expired franchise agreements:

> (d)(1) The term of possession for valuation purposes shall be the reasonably anticipated term of possession. The stated term of possession shall be deemed the reasonably anticipated term of possession unless it is demonstrated by clear and convincing evidence that the public owner and the private possessor have reached a mutual understanding or agreement, whether or not in writing, such that the reasonably anticipated term of possession is shorter or longer than the stated term of possession….
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> (d)(2) If there is no stated term of possession, the reasonably anticipated term of possession shall be demonstrated by the intent of the public owner and the private possessor, and by the intent of similarly situated parties, using criteria such as the following:……..

In *American Airlines, Inc. v. County of Los Angeles* (1976) 65 Cal.App.3d 325, the appellate court concluded that the airlines did not have a possessory interest beyond the stated terms of their leases at Los Angeles international Airport. Although the assessor argued the airlines had "de facto options" to renew the leases, the airlines insisted there were no understandings or agreements providing for renewal. Under the circumstances present in that case, the appellate court determined it was improper for

the assessor to use a term of possession beyond the remaining terms of the airlines' leases. (*Id* at 332) The *American Airlines* decision was the genesis of Rule 21(d)(1) because the appellate court suggested that the outcome could be different if the two parties had an "understanding" as to renewal. (*Id* at 331) [2]

At the April 21, 2006 evidentiary hearing, Charter presented evidence that eight of the franchise agreements were *unexpired* and had remaining terms ranging from 4 to 10 years. Pursuant to Rule (d)(1), Charter argues that the Assessor was required to use the number of remaining years as the reasonably anticipated term of possession.[3]

The County responds that the Board correctly relied on the *exception* set forth in Rule 21(d)(1). In determining the *reasonably anticipated term of possession*, the Board accepted the Assessor's argument that Charter's franchise agreements are *indefinite* in duration because they are almost always renewed. In the Board's view, it does not matter how many years remain before expiration in that the franchise agreements will always be renewed. Pursuant to Rule 21(d)(1), the Board decided that there was clear and convincing evidence that Charter reached a mutual unwritten understanding with

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2 Charter asks the Court to take judicial notice of two documents that show the California Assessors' Association's (CAA) attempts to have the State Board of Equalization amend Rule 21. On July 9, 2007, the CAA petitioned the State Board of Equalization to amend Rule 21 because the assessors in California "struggle" with the meaning of certain sections. The CAA sought to lower the burden of proof from clear and convincing to preponderance of evidence because the higher standard was too difficult to obtain. The CAA also sought a better definition of the term "mutual understanding," as well as examples that could be relied upon as evidence of a mutual understanding. The State Board of Equalization rejected CAA's petition, stating that it needed more information. Charter requests the Court take judicial notice of these two documents, pursuant to Evidence Code §452(c), on the basis that CAA's petition, and the State Board of Equalization's response, are official acts of a legislative or executive department. It is proper for the Court to take judicial notice of regulations and legislative enactments, which includes legislative history, committee reports and documents interpreting statutes. §452(b); *Kaufman & Broad Communities v. Performance Plastering* (2005) 133 Cal.App.4th 26, 31) Accordingly, Charter's request for judicial notice of the two documents is granted. However, the CAA petition and the State Board of Equalization's response merely confirm the obvious, i.e., that the Assessor has a higher burden of proof when using a term other than the stated term of possession.

3 For example, if the original term of the franchise agreement were 15 years, and if there were 10 years remaining until expiration of the agreement, then the term of possession for valuation purposes should be 10 years. Charter argues that, each subsequent year, the term of possession necessarily declines. In the next year when there are only 9 years remaining, the term of possession for valuation purposes becomes 9 years. This approach is used until the franchise agreement's term expires.

the public entities that the anticipated term of possession is different than the stated term of possession.[4]

The County further contends that, in finding a mutual understanding, the Board was entitled to rely upon Charter's Form 10-K statement issued to the SEC and its shareholders which states:

> "The Company has sufficiently upgraded the technological state of its cable systems and now has sufficient experiences with local franchise authorities that have acquired franchises to conclude that **substantially all franchises will be renewed indefinitely**."(AR Vol. 2 page 734, emphasis added)

According to the County, the Board was also justified in relying upon evidence that Charter had invested over $50,000,000 in technology upgrades, and that, although given the opportunity, Charter could not provide one example of when a franchise agreement was not renewed. Based upon all of this evidence, the Board concluded there is substantial evidence of a mutual unwritten understanding that the franchise agreements have indefinite terms.

The applicable standard of review plays a vital role in the outcome of the "term of possession" issue. In *Freeport-McMoran Resource Partners v. County of Lake* (1993) 12 Cal.App.4th 634, the plaintiff operated two geothermal power plants. Similarly to this case, plaintiff brought a refund action. The parties agreed that the capitalized income approach was the proper method to use in determining the value of geothermal properties, but disagreed as to the proper *method* for determining the income stream to be utilized under this approach. The parties disputed the standard of review, which the appellate court addressed as follows:

> Where a taxpayer challenges the validity of the valuation method used by an assessor, the trial court must determine as a matter of law "whether the

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4 It appears the term of possession regarding *expired* franchise agreements in not disputed. In assigning a term of possession to an expired franchise agreement, the Assessor used a term of 10 years on the basis that, when the agreement renews, it will be for a 10 year term. Charter does not dispute this methodology.

challenged method of valuation is arbitrary, in excess of discretion, or in violation of the standards prescribed by law." (*Bret Harte Inn, Inc. v. City and County of San Francisco* (1976) 16 Cal.3d 14, 23) Our review of such a question is de novo. (*Dennis v. County of Santa Clara* (1989) 215 Cal.App.3d 1019, 1025-1026) By contrast, where the taxpayer challenges the application of a valid valuation method, the trial court must review the record presented to the Board to determine whether the Board's findings are supported by substantial evidence but may not independently weigh the evidence. (*Bret Harte Inn, Inc. v. City and County of San Francisco, supra,* 16 Cal.3d at p. 23; *Dennis v. County of Santa Clara, supra,* 215 Cal.App.3d at p. 1026.) This court, too, reviews a challenge to application of a valuation method under the substantial evidence rule. (*Dennis v. County of Santa Clara, supra,* 215 Cal.App.3d at p. 1026)(*Freeport-McMoran, supra* at 640)

Although the distinction between "method" and "application of a method" is not intuitively obvious, the *Freeport-McMoran* court ultimately determined that the challenge was to the "method" used by the assessor, which required de novo review. (*Id* at 641) Here too, Charter's push for *de novo* review is based in large measure on the fact that all of the material facts are undisputed. However, this case implicates the sufficiency of the evidence under Rule 21(d)(1) and not the "method" used by the Board.

Stated somewhat differently, Rule 21(d)(1) sets forth the method for how the Assessor is to determine the reasonably anticipated term of possession. The parties do not dispute that the proper method for determining the term of possession is set forth in Rule 21(d)(1). Although couched as a challenge to the methodology, however, Charter is in effect disputing the Assessor's *application of the evidence* to the agreed-upon methodology, i.e., whether clear and convincing evidence supports the decision to use a term of possession that is different from the stated term of possessions in the franchise agreements.

In *Dennis v. County of Santa Clara* (1989) 215 Cal.App.3d 1019, the appellate court summarizes substantial evidence rule as follows:

> In reviewing the application of a valid valuation method, the trial court reviews the entire record to determine if the findings are supported by substantial evidence. (*Norby Lumber Co. v. County of Madera* (1988) 202 Cal.App.3d 1352, 1362; *Hunt-Wesson Foods, Inc. v. County of Alameda* (1974) 41 Cal.App.3d 163, 176) A board of assessment appeals is "'the sole judge of questions of fact and of the values of property.'" (*Id.* at p. 177.) As the court stated in *Bank of America v. Mundo* (1951) 37 Cal.2d 1, 5 "the taxpayer has no right to a trial de novo in the superior court to resolve conflicting issues of fact as to the taxable value of his property."
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> Like the trial court, the appellate court may not independently weigh the evidence, but must apply the substantial evidence rule. (*A.F. Gilmore Co. v. County of Los Angeles* (1960) 186 Cal.App.2d 471, 477 (3) ["'[T]he term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached the decision ....' [Citation.]"] (Italics in original.))(*Dennis, supra* at 1024)

The Board's Findings of Fact (AR Vol. 3 pages 1142-1161) explain that the Board found clear and convincing evidence that the franchise agreements were for an indefinite duration. The Board concluded that an "understanding," one contrary to the stated remaining terms of the franchises, had been clearly and convincingly shown.

The Board first relied on Charter's Form 10-K statement, issued to the SEC and its shareholders, which states that "[t]he Company has sufficiently upgraded the technological state of its cable systems and now has sufficient experiences with local

franchise authorities that have acquired franchises to conclude that substantially all franchises will be renewed indefinitely."(AR Vol. 2 page 734) Publicly-traded companies are very conservative in making statements of fact in documents on file with the SEC. False statements in Form 10-Ks can subject companies and their principal officer's to liability under the Federal securities law. Citation

The Board next relied on related evidence in the Form 10-K claiming that Charter had invested $50,000,000 in technology upgrades. The Board also took into account that Charter, when given the opportunity at the hearing, failed to demonstrate that even one single franchise agreement had not been renewed.[5]

Pointing to dictionary definitions and proposals for legislative clarification, Charter hangs its hat on a narrow interpretation of "mutual understanding" in Rule 21 (d)(1). However, this Court is not persuaded that, in this specific situation, there needs to be some sort of acknowledged mutual agreement between the parties, reflecting a meeting of the minds.

As evidenced in Charter's publicly filed documents, the factual reality is that, no matter what may be stated during the course of negotiations, Charter and the cable markets operate with a strong belief that these cable franchises are likely to be uniformly renewed for the foreseeable future. This is very similar to the "option" situation discussed by the court in *American Airlines*, 65 Cal.App.3d at 331-332 and n.8. Moreover, unlike *American Airlines*, the administrative record here contains powerful unilateral admissions that eclipse the need for mutuality in the classical sense.

At oral argument, Charter's counsel forcefully argued that it is fundamentally unfair to tax Charter "on something that Charter does not own," as opposed to a concrete leasehold interest. This argument is something of a red herring because Charter, of course, does own all of the leases upon which it is being taxed; however, the taxable *value of* these leases is higher than Charter would like because the leases are being appraised as a longer length lease, regardless of the stated term.

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5 Even Charter's representative acknowledged the powerful probative value of this evidence. (AR Vol. 3, page 1007)

Whether the stated term is one, ten, or fourteen years, the Board concluded that the *economic value* of that remaining term was going to be based upon an expectation of fifteen-year renewals for the foreseeable future. In terms of a market for cable services, the Board found that a term of lease with one year remaining would in fact command a higher rate in the market, and that it would in reality be viewed as a much longer term because of the market's recognition that this shorter-term lease would invariably be renewed. Thus, a willing buyer, in dealing with a willing seller, would be required to pay a significant premium, irrespective of the stated remaining leasehold term, because of the captive market, the huge sunk investment of capital, and the absence of real competition. In this regard, Charter's inability to show even *one instance* of non-renewal is powerful support for the Board's decision.

Based upon the entire record, including the evidence and reasonable inferences therefrom, a reasonable Assessment Appeals Board, acting reasonably, might have reached the decision that Charter's leases would be renewed for fifteen-year terms into the foreseeable future. Similarly, the Board was justified in not employing a declining year term of lease. This is all the law requires.

Economic Rent

The income that is being capitalized is the amount of annual economic benefit or "rent" that the public entities receive. The economic benefit is the amount of money that Charter is required to pay to the local public entities to use the public entities' properties and operate its business. Here, the public entities receive a "franchise fee" which is capped by the federal government at 5% of Charter's income. The current franchise agreements set the franchise fees at 3% or 5%.

When calculating the income capitalization, the Assessor used as "economic rent" a figure of 10%. The Assessor argues that this 10% is made up of the 5% franchise fee plus additional value in all of the in-kind benefits that Charter provides to the public entities (e.g. free internet access, free cable to public buildings, free fiber

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optic and cash donations). The Assessor contends that those benefits, plus the franchise fee, equate to 10%.

Charter counters that the economic rent, at most, is the total franchise fee of 3% or 5% depending on the particular franchise agreement. Charter attacks the 10% economic rent on the grounds the Assessor failed to present sufficient evidence to quantify the value of the in-kind benefits. Charter contends that the Assessor concluded that the in-kind benefits add up to an additional 5% without quantifying the separate items. Charter contends the "standard appraisal methodology" requires the presentation of comparable rents, which the Assessor did not provide.

Conversely, Charter claims it presented substantial evidence to support its claim that 5% is a reasonable economic rent for a cable possessory interest. Evidently, in the 1990's economic rent of 10% for cable systems was typical. However, Charter argues the current marketplace is much different now because of the influx of satellite television. Cable systems no longer are the monopoly and have competition from satellite television, such that 10% rent is no longer feasible.

In the Board's Findings of Fact, it is noted that the Assessor presented evidence as to typical market rent (percentages) as well as documents indicating in-kind payments by franchising agencies to support a market rent of 10% of revenues. (AR, Vol. 3 page 1151) Ultimately, the Board concluded that neither party had presented compelling and controlling evidence on the comparable market values for economic rent. The Board was "persuaded" that the economic rate should be 10% despite the absence of precise quantification by either side. (AR, Vol. 3 page 1155)

The provisions of Tax Rule 107.7 provide as follows:

107.7. Valuation of cable television and video service possessory interests; intangible assets or rights of cable television system or provider of video service; statement required upon change of ownership of cable television or video service possessory interest.

(a) When valuing possessory interests in real property created by the

right to place wires, conduits, and appurtenances along or across public streets, rights-of-way, or public easements contained in either a cable franchise or license granted pursuant to Section 53066 of the Government Code (a "cable possessory interest") or a state franchise to provide video service pursuant to Section 5840 of the Public Utilities Code (a "video possessory interest"), the assessor shall value these possessory interests consistent with the requirements of Section 401. The methods of valuation shall include, but not be limited to, the comparable sales method, the income method (including, but not limited to, capitalizing rent), or the cost method.

(b)(1) The preferred method of valuation of a cable television possessory interest or video service possessory interest by the assessor is capitalizing the annual rent, using an appropriate capitalization rate.

(2) For purposes of this section, the annual rent shall be that portion of that franchise fee received that is determined to be payment for the cable possessory interest or video service possessory interest for the actual remaining term or the reasonably anticipated term of the franchise or license or the appropriate economic rent. If the assessor does not use a portion of the franchise fee as the economic rent, the resulting assessments shall not benefit from any presumption of correctness.

(c) If the comparable sales method, which is not the preferred method, is used by the assessor to value a cable possessory interest or video service possessory interest when sold in combination with other property, including, but not limited to, intangible assets or rights, the resulting assessments shall not benefit from any presumption of correctness.

(d) Intangible assets or rights of a cable system or the provider of video services are not subject to ad valorem property taxation. These intangible assets or rights include, but are not limited to: franchises or

> licenses to construct, operate, and maintain a cable system or video service system for a specified franchise term (excepting therefrom that portion of the franchise or license which grants the possessory interest); subscribers, marketing, and programming contracts; non-real property lease agreements; management and operating systems; a workforce in place; going concern value; deferred, startup, or prematurity costs; covenants not to compete; and goodwill. However, a cable possessory interest or video service possessory interest may be assessed and valued by assuming the presence of intangible assets or rights necessary to put the cable possessory interest or video service possessory interest to beneficial or productive use in an operating cable system or video service system.

Although the standard of review is substantial evidence under *Dennis v. County of Santa Clara*, 215 Cal.App.3d 1019, the Court has great difficulty locating substantial evidence supporting the Board's decision, and in particular its justification for a 10% rate of return.

To be sure, there is substantial evidence in the record that Charter provides a significant amount of in-kind benefits to the County, in addition to cash payments. These benefits include: free cable services to public buildings, including schools, colleges, special districts, fire stations, sheriffs and County offices; free upstream video capacity to public facilities; free Internet access service to schools and libraries; funding to maintain the Public Education in Government studio; and, an additional million dollars to work on the institutional network enhancement and two fiber-optic cables for institutional network use. (*See, e.g.* Vol. 3, A. R., pages 925 through 926.)

Although these in-kind payments unquestionably *can be* used to augment the rental value, the rationale actually used to select a 10% rate of return, as opposed to 6%, 7%, 8.5%, or 9% is almost entirely absent. Simply stated, there is no way that this Court can "bridge the analytic gap between the raw evidence and ultimate decision" or

to understand the "analytic route the administrative agency traveled from evidence to action." *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, *(EPIC*); *Great Oaks Water Co. v. Santa Clara Valley Water Dist*. (2009) 170 Cal.App.4th 956, 970-971; *Reddell v. California Coastal Commission* (2009) 180 Cal.App.4th 956, 970. It would seem that the Board pulled a rabbit out of its hat when it approved a rate of 10%.

Moreover, pursuant to Revenue and Tax Code §107.7(d), certain "intangible" rights within the franchise fee are not taxable. Although the Board was free to choose something different from the franchise fee as an appropriate rate of return, it took upon itself the burden of demonstrating its entitlement to the higher rate, and also demonstrating that the rate ultimately chosen was not in fact counting certain "intangible" rights.[6] Again, the Court cannot see the analytical route from evidence to action because the Board placed the burden on *Charter* rather than on the Assessor.

In the Board's Findings of Fact, the Board acknowledges that a percentage of the 5% franchise fee could be allocated between the right to use the possessory interest and the intangible right to operate the cable television system. However, the Board determined it was Charter that failed to present any evidence to support an allocation. Also, the Board concluded that, because the possessory interest could not be used unless Charter was granted the intangible right to operate the system, the Board was not required to make any deductions for the intangible rights. In other words, the Board believed the possessory interest was enhanced by all of the intangible rights. This was going too far.

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6 Whether the Assessor could use as economic rent a figure greater than the franchise fee was one of the questions the Board directed to the State Board of Equalization. The State Board of Equalization confirmed that Revenue and Tax Code §107.7 does not require an assessor to use a portion of the franchise fee as the estimated economic rent for a cable system taxable possessory interest. (AR, Vol. 2 page 602) The State Board of Equalization also stated that the federally mandated limit of a 5% franchise fee does not establish a limit on the economic rent of a cable system's taxable possessory interest. Charter does not contest these foundational understandings regarding the relationship between the franchise fee and the estimated economic rent.

In *Shubat v. Sutter County Assessment Appeals Bd.* (1993)13 Cal.App.4th 794, the assessment appeals board acknowledged and allocated value to four intangibles: right to do business, possessory interest, going concern value, and subscriber list. The assessor contested the assessment appeals board's findings and argued all of the intangibles are taxable either in their own right or because they add value to the possessory interest. The assessor argued many cases have held intangibles do not exist separate from the possessory interest and must therefore be assessed as part of it.

Although the trial court remanded the matter back to the assessment appeals board to examine to what extent the board took into consideration the nontaxable intangibles in computing a value for the possessory interest, the appellate court concluded: "In our view, the record sufficiently establishes the Board considered the effect of intangibles on the value of the possessory interest. It was required to do no more."(*Id* at 805)

But the rate of return chosen here is unlike the situation in *Shubat*. As opposed to taking advantage of the presumption of correctness, the Board ventured out on its own to set a rate much higher than the ordinary and preferred rate. Having done so, it was incumbent upon the Board to show the justification. If substantial evidence means anything, then the Court needs to be able to see a clear connection between the evidence before the Board and the actual rate of return that was chosen. That connection is missing. *Topanga Assn. for a Scenic Community v. County of Los Angeles* 11 Cal.3d at 515.

In sum, if the Board chooses to go above the presumptive rate of return, it must deduct from that figure any "intangibles" as required by Rule 107.7. Then, the Board may factor into the equation any in-kind benefits provided by Charter to the County. In both instances, however, the Board's rationale must be supported by substantial evidence in the record. Here, substantial evidence is lacking.

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Remedies

At oral argument, the parties addressed the question of appropriate remedies. Having considered the parties' suggestions, the Court will remand the issue of "economic rent" only to the Board for further consideration. Given the ambiguity in the evidence, as well as in the Board's analysis, the Court will permit the Board to reopen the evidence to make further findings, but it will cap the economic rent at 10%.

CONCLUSION

Charter's petition for a peremptory writ of mandate seeking a refund pursuant to Revenue and Taxation Code §5141(c) is granted in part and denied in part.

Given the age of the assessments, some going back more than 10 years, the Court strongly encourages the parties to attempt to reach some common ground so as to bring finality to these proceedings. It serves neither the parties nor the public to have tax assessments in flux dating back more than 10 years.

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DATED: April 28, 2010

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CHARLES S. CRANDALL
Judge of the Superior Court

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